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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

In applying the jurisdictional standard established by the Supreme Court in NLRB v. Bell Aerospace Co. that employees "impliedly excluded" from the coverage of the National Labor Relations Act "where persons working in 'labor relations, personnel and employment departments,' and 'confidential employees' without limiting confidentiality to

labor relations, did the Court of Appeals improperly apply this standard by concluding that the Board had found that the personal secretary to the chief executive officer and general manager of the company was not a personnel department employee.

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The Hendricks County Rural Electric Membership Corporation, cross-petitions for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Seventh Circuit in NLRB v. Hendricks County Rural Electric Membership Corporation.

OPINIONS BELOW

The Opinion of the Court of Appeals in Hendricks II (App. A, infra, 1a-13a) is reported at 627 F.2d 766. The Supplemental Decision and Order of the National Labor Relations Board (App. C, infra, 16a-21a), on prior remand from the Court of Appeals, are reported at 247 N.L.R.B. 68. The Opinion of the Court of Appeals in Hendricks I reversing and remanding the case to the Board (App. D, infra, 22a-32a) is reported at 603 F.2d 25. The Board's original

Decision and Order (App. E, infra, 33a-55a) are reported at 236 N.L.R.B. 1616.

JURISDICTION

The Judgment of the Court of Appeals in Hendricks I (App. F, infra, 56a-57a) reversing the Board's Order and remanding was entered on July 26, 1979. The Judgment of the Court of Appeals in Hendricks II (App. B, infra, 14a-15a) denying enforcement of the Board's Supplemental Order was entered on July 21, 1980. On October 8, 1980, Justice Stevens extended the time for filing the Petition for a Writ of Certiorari to and including November 18, 1980. On November 10, 1980, Justice Stevens further extended the time for filing the Petition for a Writ of Certiorari to and including December 2,

1980. The Solicitor General filed the Board's Petition for a Writ of Certiorari on December 2, 1980, Cause No. 80-885, and Hendricks County REMC received a copy thereof on December 4, 1980. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the National Labor Relations Act, 29 U.S.C. 152, provides in relevant part:

> When used in this subchapter--
>
> * * * * *
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection

with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

STATEMENT

1. The Administrative Law Judge (ALJ) and the Board found that on May 9, 1977, the "top executive officer" and "General Manager" of the Hendricks County Rural Electric Membership Corporation (Hendricks or REMC) had discharged his secretary, Mary Weatherman, because she had signed a petition directed to the REMC's board of directors requesting that they reconsider the board's decision not to reinstate Lloyd Hadley as an employee. Mr. Hadley became disabled in February, 1976, as a result of an employment accident, and in April, 1977, the Board notified Hadley that he would not be reinstated as an employee (App. E, infra, 38a-39a). On the date of her discharge, Weatherman filed an unfair labor practice charge with the National

Labor Relations Board, alleging that her discharge violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). In addition to contesting that the discharge was an unfair labor practice, Hendricks claimed at the evidentiary hearing and in its Trial Brief of February 6, 1978, to the ALJ, that Weatherman was excluded from the coverage of the Act and that the Board lacked jurisdiction for two separate reasons: (1) As a "confidential employee" in her capacity as secretary to the General Manager and top executive and operating officer of the employer, and (2) As a person working in "personnel and employment departments". Although the ALJ specifically concluded "that Weatherman was not a confidential employee as the Board defines that term," he made no decision as to

whether she was excluded from the Act as an employee working in "personnel and employment departments" (App. E, infra, 49a). However, in reviewing the evidence regarding his conclusion as to Weatherman not being a confidential employee based upon the Board's "labor nexus" standard, the ALJ determined that Weatherman opened mail addressed to Hendricks and Dillon except for correspondence from Hendricks' lawyers to the union, kept and processed all insurance claims of employees, typed Manager Dillon's letters and notices as to the dates of labor negotiation meetings, and typed minutes of the meetings of the REMC's board of directors including minutes containing references to Hadley's request for reinstatement and to other personnel matters. Additionally, the ALJ stated that Dillon was

present at labor negotiation meetings with the union, collected papers relating to labor contract negotiations including copies of positions developed by the REMC's negotiating committee and his notes taken during negotiations; and that Assistant Manager Spencer had testified that while he (Spencer) made determinations of "management policy concerning the interpretations of the labor contract with the IBEW" union, that such determinations were approved by Dillon (App. E, infra, 45a-47a).

Hendricks filed five specific Exceptions to the Decision of the ALJ with the Board including that the ALJ had failed to rule upon the issue of the exclusion of Weatherman from the Act's coverage due to the fact that she worked in the personnel and employment department of the REMC. The

Board adopted the Decision and Order of the ALJ without specifically ruling upon the Exceptions presented by Hendricks (App. E, infra, 33a-35a).

Thereafter, Hendricks filed a Petition To Review Orders of the NLRB with the United States Circuit Court of Appeals for the Seventh Circuit and argued by its Brief and orally five separate issues including the Board's failure to rule upon the issue of the exclusion of Weatherman from the jurisdiction of the Act due to her working in the personnel and employment department. The NLRB petitioned the Court for enforcement of its Order. The Court of Appeals concurred in the Board's finding that Weatherman was discharged for engaging in protected activity and that she was not a "confidential employee" under the Board's "labor nexus" standard.

However, the Board stated that it was "necessary to remand the decision for a new determination of her 'employee' status" (App. D, infra, 24a, 26a, 27a). The Court of Appeals after discussing the decision of the Supreme Court in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), held that "The legislative history of the Taft-Hartley Act, as interpreted in Bell Aerospace, requires the conclusion that all secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act" and concluded that the ALJ had "limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations". The Court of Appeals remanded the case to the Board "for a determination of whether 'by the nature

of [her] duties' she was 'given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.' H.R. 3020 §2(12)(C), 80th Cong., 1st Sess. (1947)." (App. D, infra, 31a). Additionally the Court of Appeals stated regarding the personnel and employment department exclusion that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous." (App. D, infra, 27a).

2. On October 10, 1979, the Board accepted the Court's remand and advised the parties that they may file "Statements of Position with the Board with respect to the issues raised by the

remand." In its Statement of Position, Hendricks stated "that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand" and specifically pointed out to the Board that the REMC competes with another utility and was involved in litigation cases with that utility during Weatherman's employment. The Board failed to rule upon Hendricks' request to reopening the record on remand, and issued its Supplemental Decision and Order on January 22, 1980, and stated therein that "Accepting the court's criteria for resolving questions of confidential employee status as the law of this case only, we find that Weatherman was not a confidential employee" (App. C, infra, 18a & 19a). Hendricks again filed a Petition for Review of the Board's Order with the

Court of Appeals, and thereafter, the NLRB petitioned the Court of Appeals for enforcement of its Order. The Court of Appeals granted the Petition for Review and denied enforcement of the Order stating that "we adhere to everything we said in Hendricks" I and holding that the Board had erred in not allowing a new evidentiary record and by not applying the new standard to define a confidential employee as determined in Hendricks I. The Court stated "We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus." (App. A, infra, 6a, 7a & 8a).

REASONS FOR GRANTING THE CROSS-PETITION

Hendricks only seeks the granting

of its Cross-Petition for a Writ of Certiorari in connection with the Solicitor General's and Board's Petition for a Writ of Certiorari and the question presented therein by the Solicitor General in Cause No. 80-885. Hendricks believes and argues to this Court that in the event the Court grants the Solicitor General's Petition for Writ, that the Court should consider also the question presented in Hendricks' Cross-Petition for a Writ, which question is related to the issue presented by the Solicitor General. The Court of Appeals' conclusion in Hendricks I that "The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous," is an erroneous conclusion since the

Administrative Law Judge failed to rule on this issue in his written decision. In fact, Hendricks argued to the Board as an exception to the ALJ's decision and to the Court of Appeals in its Brief, the failure to rule upon the issue of the exclusion of employee Weatherman from the jurisdiction of the Act due to the fact that she worked in the "personnel and employment department" of the REMC. Although the Supreme Court should ordinarily acquiescence in a conclusion of fact made by the lower court, the Supreme Court will review the conclusion if it is not supported by the evidence in the record and constitutes a glaring error. Harkin v. Brundage, 276 U.S. 36 (1928); Besser Manufacturing Co. v. United States, 343 U.S. 444 (1952).

Additionally, by upholding such a perceived conclusion that Weatherman

was not an employee working in a personnel department, the Court of Appeals placed itself in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in NLRB v. Allied Products Corp., 548 F.2d 644 (1977), a case also cited in the Solicitor General's Petition for a Writ as being in conflict with the Seventh Circuit's definition of the term "confidential employee" also established in Hendricks I. The Sixth Circuit in Allied Products determined that the Board had committed error by including in a bargaining unit the personal secretary to the "general manager and chief labor relations administrator of the plant" and the secretary to a division manager who did not "formulate, determine and effectuate company labor relations policy," but did "formulate, determine and effectuate

company-wide management policies which critically affect labor relations." The Sixth Circuit excluded the general manager's secretary from the Act's coverage since she did open all mail to him not marked confidential and did type any labor relations paperwork that he might generate; and, the Court of Appeals excluded the division manager's secretary since the manager was involved in management policies and since his secretary at times substituted for the secretary to the general manager. NLRB v. Allied Products Corp., supra, at 648, 649, 650. Very similarly, in Hendricks, Weatherman was the "personal secretary to its general manager and chief executive officer" (App. A, infra, 2a), opened mail addressed to the REMC and to the general manager except for correspondence from lawyers to the

union, maintained files for employees making insurance claims which she processed, typed all of the general manager's letters and notices of dates of union negotiation meetings, typed the minutes of the meetings of the board of directors which included personnel matters, and shared a partitioned office with Manager Dillon (App. E, infra, 45a & 46a; App. C, infra, 19a). Additionally, the ALJ and Board in Hendricks found that the general manager attended labor negotiation meetings, collected papers relating to labor contract negotiations including positions developed by the REMC's negotiation committee and notes taken during negotiations, and approved "determinations of 'management policy concerning interpretations of the labor contract with the IBW'" (App. E, infra, 47a).

Furthermore, the Supreme Court in NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974), specifically held that "Among those mentioned as impliedly excluded were persons working in 'labor relations, personnel and employment departments', and 'confidential employees'", which holding was reiterated by the Seventh Circuit in Hendricks I (App. D, infra, 29a). Nevertheless, the Seventh Circuit failed to apply the "labor relations, personnel and employee departments" portion of the exclusion by erroneously concluding that the ALJ had determined that Weatherman was not a personnel department employee.

CONCLUSION

In the event that the Solicitor General's Petition for a Writ of Certiorari is granted in Cause No. 80-885,

then the Cross-Petition for a Writ of Certiorari should also be granted.

Respectfully submitted.

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January 2, 1981

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 80-1283

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

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ARGUED JUNE 3, 1980—DECIDED JULY 21, 1980

Before SPRECHER and CUDAHY, *Circuit Judges*, and CAMPBELL, *Senior District Judge.**

SPRECHER, *Circuit Judge*. This review causes us to examine again the questions (1) what standard is to be applied to determine a confidential employee excluded under the National Labor Relations Act, 29

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

U.S.C. §§ 151 *et seq.*, and (2) whether the Board's finding that an employee was not a confidential employee is supported by substantial evidence on the record considered as a whole. See 29 U.S.C. § 160(e).

I

On July 17, 1978, the Board issued its order finding that the Company had violated section 8(a)(1) of the Act by discharging Mary M. Weatherman, the personal secrtary to its general manager and chief executive officer, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Company to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Company to reinstate Weatherman to her former job, or a substantially equivalent position, with back pay. 236 N.L.R.B. 1616 (1978).

On July 26, 1979, this court enforced the Board's order concerning the 8(a)(1) interrogation. However, we reversed and remanded the portion of the order dealing with the discharge of Weatherman and ordered the Board to use the legal standard outlined in our opinion to determine whether she was a confidential employee and therefore not covered by the Act. 603 F.2d 25 (7th Cir. 1979).

On October 10, 1979, the Board advised the parties that it had "decided to accept the remand from the Court of Appeals . . . , and all parties are hereby advised that they may file Statements of Position with the Board . . . ." The Company in its statement indicated that it believed that the record already con-

tained enough evidence to require the conclusion that Weatherman was not an employee under the standard established by this court. The Company added:

> However, if the Board believes that its prior conclusions and testimony hereinbelow does [*sic*] not mandate such a conclusion, the . . . [Company] believes that it is entitled to and that the Board should order a reopening of the proceedings to present further evidence regarding the issues on remand.

Record, Statement of Position of Hendricks County Rural Electric Membership Corporation, at 3.

Instead of taking further evidence, the Board reexamined the previous record and reaffirmed its prior conclusion that Weatherman was an employee under the Act. 247 N.L.R.B. No. 68 (1980).

The case is again before the court upon the Company's petition for review and the Board's cross-application for enforcement.

II

In *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court held that Congress intended to exclude from the protection of the National Labor Relations Act all employees properly classified as " 'managerial,' rather than just those in positions susceptible to conflicts of interest in labor relations." *Id.* at 274. To reach this holding, the Court first concluded that "confidential employees" were excluded from coverage under a "broad definition" not limited to those having a labor nexus. The Court said:

> In 1946 in *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322, the Board had narrowed its definition of "confidential employees" to embrace only those

> who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

416 U.S. at 284 n.12.

Immediately following in the text, the Court quoted with complete approval the Court of Appeals statement in *Bell Aerospace* as follows:

> "Surely Congress could not have supposed that, while confidential secretaries could not be organized, their bosses could be."

Id. at 284, quoting 475 F.2d 485, 491-92 (2d Cir. 1973).

Thus, although the *Bell Aerospace* holding applied to managerial employees, the statement in note 12 about confidential employees was not a mere dictum,[1] but was the basis, or at least part of the basis, upon which the holding itself was constructed. In *United States* v. *Bukowski*, 435 F.2d 1094, 1101 (7th Cir. 1970), we noted that a court of appeals could not depart, at its own choosing, from an analytical construct uniformly adhered to in decisions of the Supreme Court.

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[1] A dictum in a Supreme Court opinion may be brushed aside by the Supreme Court as dictum when the exact question is later presented, but it cannot be treated lightly by inferior federal courts until disavowed by the Supreme Court. See 1B Moore's Federal Practice ¶ 0.402, at p. 112 & n.3.

Although the Board has accepted our prior decision in this case, in at least one subsequent case pending on review before us, *Malleable Iron Range Co.* v. *N.L.R.B.*, No. 79-1991, the Board strongly urges that our prior decision be overruled,[2] either on the basis that the Supreme Court was in error or misled as to the legislative history in footnote 12, or because of the Court's later opinion in *N.L.R.B.* v. *Yeshiva University*, 100 S.Ct. 856 (1980).

Not only are decisions of the Supreme Court of the United States and their clear implications absolutely binding on inferior federal courts,[3] but this is especially true of matters of legislative history and congressional purpose, *In re Continental Investment Corp.*, 586 F.2d 241, 248 (1st Cir. 1978), and of standards to be applied by an administrative agency or lower court. *Patterson* v. *Brown*, 393 F.2d 733, 736 (10th Cir. 1968). While we seriously doubt that the Supreme Court could be misled by counsel, a court of appeals is not at liberty to go behind an opinion or its clear implications on the ground that the Supreme Court "was not fully apprised by counsel in that case as to the legislative history . . . ." *United States* v. *Russell*, 461 F.2d 605, 608 (10th Cir. 1972).

We find nothing in the *Yeshiva* case which undermines or impliedly overrules anything said in *Bell*

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[2] However, this decision is the law of this circuit unless and until this court sitting in banc would determine otherwise or unless higher authority makes a contrary determination. *Powell* v. *United States*, 338 F.2d 556, 557 (7th Cir. 1964).

[3] The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const., Art. III, § 1.

Aerospace, which is cited with approval throughout the opinion. Therefore, we adhere to everything we said in *Hendricks County Rural Electric Membership Corp.* v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979), despite the Board's opinion that it is erroneous insofar as it relies upon note 12 of *Bell Aerospace*. Any changes in the substance of note 12 must come from higher authority.

III

In our prior opinion, we concluded that:

> The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case for a determination [under the proper standard] . . . .

603 F.2d at 30 [footnote omitted].

The administrative law judge in his original opinion made it clear that the only standard he applied and the only one that the record evidence supported was the labor nexus standard:

> The record shows that Weatherman did not act "in a confidential capacity" to Dillion [the general manager] in any meaningful sense with respect to . . . [the Company's] labor relations policies . . . .
>
> * * * *
>
> Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

236 N.L.R.B. at 1619, 1620.

The record context in which the above statements were made by the administrative law judge was as follows. Early in the proceedings, the Company filed a written motion to dismiss on the ground that Weatherman was a confidential employee excluded under the Act. In an order dated July 22, 1977, an administrative law judge other than the one who eventually heard the evidence ruled that the motion would be reserved for the judge who would conduct the hearing. When the hearing began before the second judge, he noted the pendency of the motion and reserved his ruling. Near the beginning of the general manager's testimony intended to establish the confidential nature of Weatherman's job, the administrative law judge admonished the general manager to "stick to personnel files" and "to files pertaining to the employees." Transcript, Vol. II, at 101. A reading of the administrative record makes it obvious that the admonitions were observed inasmuch as there is clearly a conscious effort by all participants to restrict the evidence to that which pertains to labor or personnel matters.

If we had believed that the prior record was sufficient to support a finding under the *Bell Aerospace* standard, we would not have remanded the proceeding to the Board. Upon remand, the Board asked for statements of position, and the Company's position was that the proceedings should be reopened to present further evidence. When an erroneous standard for the admission of evidence is used, it follows almost mandatorily that a new record is needed, not only to add evidence in patchwork fashion but also possibly to rehear all the relevant evidence under the different admission standard.

The Board did not reopen the proceedings under the different standard, did not take any additional

evidence, did not remand the proceedings to the administrative law judge who heard the original evidence, and has sent us the same record we reviewed before. We are asked to enforce an order which purports to apply the new standard to the old record but actually reapplies the old standard incorporating the labor nexus.[4]

The new broad standard was found to apply to the old record on the basis of "Dillon's statement that the . . . [Company] simply did not have secret papers or documents." Memo. op. at 5. Dillon's statement was that the Company had "nothing to hide from the *members*," Transcript, Vol. II, at 115 [emphasis supplied], and was supposedly supported by the Board's gratuitous conclusion that the Company "is a cooperative, and that all members *presumably* have access to [its] documents . . . ." Memo. op. at 4 n.8 [emphasis supplied]. That a company has no secrets from its members does not mean that it does not have matters or documents which are confidential insofar as its non-confidential employees are concerned, insofar as its competitors are concerned, insofar as regulatory agencies are concerned, and insofar as the public is concerned.

The petition to review is granted, and the application to enforce the order is denied.

ENFORCEMENT DENIED

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[4] The order is larded with labor nexus language: (1) "[A]mong the mail she did not see was that regarding union relations"; (2) "this correspondence apparently did not relate to labor relations or personnel matters"; (3) "[w]hile these meetings [of the Board of Directors] apparently occasionally involved personnel matters"; (4) "Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters."

CUDAHY, *Circuit Judge*, dissenting.

Unfortunately, the majority analysis here leads to a quite unjustifiable outcome. The result is that Mary Weatherman, personal secretary to the general manager of a rural electric membership corporation, has been lawfully fired for signing a petition asking for the reinstatement in his job of a friend and fellow worker who lost his arm in the course of his employment. Whatever may be our discomfiture at the Board's maneuvers on remand, only the gravest of reasons should lead us to sanction such a lamentable injustice.

While it might have been more politic for the Board to have reopened the hearing, the Company argues only one specific fact which it would have tried to establish during such a reopening: the Company's "involve[ment]" in "three (3) litigation cases" (presumably with a competitive investor-owned utility). There is slight likelihood that this "new fact" would materially change the basis for evaluating Weatherman's status as a "confidential secretary." The fact is that Weatherman's status was well explored and ventilated at the original hearing, and both we and the Board should be able to reach the requisite conclusion based on that record.

Hendricks County Rural Electric Membership Corp. v. *N.L.R.B.*, 603 F.2d 25 (7th Cir. 1979) (*"Hendricks I"*) does indeed hold that a confidential *secretary* is excluded from the protection of the Labor Act (whether or not the confidences are labor relations-related). *Hendricks I* is , for better or for worse, the present law of this Circuit.[1] But there is abundant evidence in the record to support the Board's con-

[1] *But see Union Oil Company of California* v. *N.L.R.B.*, 607 F.2d 852 (9th Cir. 1979), which reaffirmed the traditional

clusion that Weatherman is not properly classified as a confidential secretary.

The Company's strongest (or at least most fully developed) argument to the contrary seems to be that Weatherman was responsible for processing employees' medical and disability insurance claims—admittedly confidential. But these were the confidences of *employees* she had to keep. It is simply ludicrous that one should be classified as part of "management" and lose the protections conferred on "labor" because one is entrusted with the confidences of one's fellow workers.

On a broader issue, the majority seems to assert that *Hendricks I* holds that "confidential *employees*" (not limited to secretaries and, of course, not limited by the labor relations' nexus) are unprotected under the Act. With the most profound deference, I find the holding of *Hendricks I* to be more narrowly directed specifically to *secretaries*. That case teaches that:

> The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. 603 F.2d at 30.

This conclusion of our Court may be consonant with the dicta of *Bell Aerospace*,[2] which found, quoting the Second Circuit that, "surely Congress could not have

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Board standard under *The B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956), that the employee, to be excluded, must assist in a confidential capacity *with respect to labor relations. Accord, N.L.R.B.* v. *Allied Products Co., Richard Bros. Div.*, 548 F.2d 644 (6th Cir. 1977).

[2] *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

supposed that, while "confidential secretaries could not be organized, their bosses could be." 410 U.S. at 234 (quoting 475 F.2d at 491-92). If there is anything relating to confidential *employees* "upon which the holding [in *Bell Aerospace*] itself was constructed" (as the majority here perceives the issue), it is most evidently the relationship of confidential *secretaries* to their "managerial" bosses.

Everything else—beyond confidential secretaries—that relates to "confidential employees" is at the farther reaches of dictum, both in *Bell Aerospace* and in *Hendricks I*. Nothing about confidential employees generally is found in the holding in either case, nor is the status of such employees generally, a part of the essential framework from which the respective holdings emerge.

The majority admonishes us of the need for deference to the dicta of the Supreme Court. I have no quarrel with this as far as it goes, but the fact remains that the broad dicta in footnote 12 of *Bell Aerospace* about "confidential employees" are ambiguous[3] and essential to nothing. There are dicta and there are dicta, and the rule of *stare decisis* must give them effect appropriate to the circumstances under which they appear.[4] To build a whole new

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[3] Thus footnote 12 contains the following quotation from a House Report: *"Most of the people who would qualify as 'confidential' employees are executives and are excluded from the Act in any event.*

The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these." Does this suggest that lower-level employees, not clerks or secretaries to executives, are rarely to be excluded?

[4] The Supreme Court long ago stated:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection

body of law about "confidential employees" uninvolved in labor relations, on the footnote dicta of *Bell Aerospace*—all in the name of deference to the Supreme Court—is quite simply totally unwarranted.[5] To paint with a broad brush about the purported exclusion of "confidential employees" (other than those having the well-accepted "labor nexus") from the protection of the Act may be to strike a major blow at white collar unionism. Many, *if not most*, white collar workers are involved in something which may be argued to be "confidential" in some general sense. There are matters of credit, of costs, of designs, of customer lists, of prices, of medical records—the list is endless.[6] I do not perceive at all

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with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[5] In *Hendricks I* this court said in commenting on *Bell Aerospace*, "Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well." 603 F.2d at 29.

[6] "Because most employees have an arguably confidential relationship with management, and because an expansive application of the exclusionary rule would deprive many employees of the right to bargain collectively, the Board has narrowly construed the definition of confidential employee." *Union Oil Company of California* v. *N.L.R.B.*, *supra*, n.1 at 853.

that the dicta of *Bell Aerospace* point down this road. Nor does *Hendricks I* require such a journey.

With the utmost respect, I dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Sprecher
Judge Cudahy dissenting

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 80-1283

Before
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge *

July 21, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review and cross-Application for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

of the National Labor Relations Board reviewed in this matter be, and the same is hereby, DENIED, with costs, in accordance with the opinion of this court entered this date.

A True Copy:

Teste:

/s/ Kathy Davis
Deputy Clerk of the U.S. Court of Appeals for the Seventh Circuit

APPENDIX C

FPT
D—6002
Danville, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 25—CA—8921

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

and

MARY M. WEATHERMAN, an Individual

SUPPLEMENTAL DECISION AND ORDER

On July 17, 1978, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman, personal secretary to its general manager, for signing a petition calling for the reinstatement of an injured employee, and by interrogating another employee regarding the petition. The Board ordered the Respondent to cease and desist from discharging or taking other adverse action against any employee for engaging in protected, concerted activity, and from coercively interrogating employees concerning such activity. The Board further ordered the Respondent to reinstate Weatherman to her former job or, should that job no longer exist, to a substantially equivalent position, and to make her

[1] 236 NLRB No. 212.

whole for any loss of earnings she may have suffered by reason of her discharge.

Thereafter, the Respondent filed a petition for review of the Board's Order in the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order. On July 26, 1979, the court issued its decision,[2] which enforced the Board's Order concerning the 8(a)(1) interrogation, but reversed and remanded the aspect of the case dealing with the discharge of Weatherman to determine whether she was a confidential employee and therefore not covered by the Act under a different standard than that used by the Board.

On October 10, 1979, the Board advised the parties that it had decided to accept the remand, and that they might submit statements of position with respect to the issue raised by the remand. Thereafter, the General Counsel and the Respondent filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The issue on remand is narrowly limited to the alleged confidential status of Weatherman, as the court concluded that the Board's finding that she was discharged for participating in protected, concerted activity—signing a petition requesting the reinstatement of an injured employee—was supported by the evidence.

In our original decision, we found that Weatherman was not a confidential employee measured

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[2] *Hendricks County Rural Electric Membership Corporation* v. *N.L.R.B.*, 603 F.2d 25.

against our traditional standard that such employees are "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." [3] And the court agreed with our factual determination that, as personal secretary to Wallace Dillon, the Respondent's general manager, Weatherman did not act and assist him in a confidential capacity with respect to labor relations policies. The court also agreed with our finding that she did not work in a position equivalent to a personnel department employee. However, the court concluded, in light of its interpretation of the Supreme Court's opinion in *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*,[4] that *B. F. Goodrich* does not enunciate the correct legal standard for judging confidential employee status under the Act. Rather, the court held that the proper criteria to be applied is whether, by the nature of the employee's duties, the employee is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer. Accordingly, recognizing that "[t]he determination of 'confidential' status is . . . a question appropriately committed to Board discretion," the court remanded the case to us to decide under this standard if Weatherman was a confidential employee in terms of her "actual job responsibilities, authority, and relationship to management." [5] Accepting the court's criteria for resolving questions of confidential employee status

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[3] *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956).

[4] 416 U.S. 267 (1974).

[5] 603 F.2d at 30.

as the law of this case only, we find that Weatherman was not a confidential employee.

When she was discharged in May 1977, Weatherman had been personal secretary to Dillon, the Respondent's general manager and top executive officer, for a little more than 4 years. In this capacity, she answered the telephone and opened mail addressed to the Respondent and Dillon, except for some mail which was removed before it reached her by Office Manager Donald Douglas and given to Dillon by him.[6] Although Weatherman typed all of Dillon's letters, this correspondence apparently did not relate to labor relations or personnel matters other than occasional letters referring to the dates of negotiating meetings with a union. Nor is there any evidence that it concerned confidential matters of any description. Weatherman generally did not place Dillon's telephone calls, nor did she keep a record of his appointments. Weatherman did share a partitioned office with Dillon, but no personnel records or confidential records of any type were kept there, excluding Dillon's testimony that he kept some papers concerning labor negotiations in a file behind his desk.[7] Weatherman did not attend meetings of Respondent's board of directors or other management meetings. However, she did type minutes of meetings of the board

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[6] Among the mail she did not see was that regarding union relations.

[7] As we pointed out in the initial decision herein, Weatherman had no duties concerning labor negotiations, nor was there any evidence that she was even aware of the existence of Dillon's file.

Weatherman did maintain some files respecting routine insurance claims filed by employees, which she was responsible for processing, for her own convenience.

of directors and the agenda for such meetings. While these meetings apparently occasionally involved personnel matters, there is no indication that such matters, or any other issues discussed during them, were confidential.[8] Weatherman did not type internal memoranda regarding labor relations or personnel or employment matters. Finally, and most significantly, Dillon conceded at the hearing that the Respondent did not maintain secret or classified papers or documents.

As previously noted, the court of appeals affirmed not only our earlier finding that Weatherman did not work in a confidential capacity in respect to labor relations matters, but also that she was not the equivalent of a personnel department employee. Thus, for Weatherman to qualify as a confidential employee under the standard erected by the court, the record would have to disclose that she performed confidential duties in connection with nonlabor relations or personnel areas. Quite clearly, however, the evidence taken at the hearing contains no hint that Weatherman had any such responsibilities. That this was not merely an oversight in the course of litigation is confirmed by Dillon's statement that the Respondent simply did not have secret papers or documents.

Therefore, we reaffirm our conclusion, made in the original decision in this case, that the Respondent discharged Weatherman in violation of Section 8(a)(1) of the Act, and our remedial Order concerning that violation.[9]

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[8] We noted in our original decision that the Respondent is a cooperative, and that all members presumably have access to documents such as the minutes of board meetings.

[9] It is unnecessary to reaffirm our previous Order in regard to the Respondent's violation of Sec. 8(a)(1) by coercively

ORDER

It is hereby ordered that the Order issued by the Board in *Hendricks County Rural Electric Membership Corporation*, 236 NLRB No. 212 (1978), concerning the discharge of Mary M. Weatherman in violation of Section 8(a)(1) of the Act be, and it hereby is, reaffirmed.

Dated, Washington, D.C. January 22, 1980

JOHN H. FANNING, Chairman

JOHN A. PENELLO, Member

JOHN C. TRUESDALE, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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interrogating an employee, inasmuch as the court has already enforced that portion of our Order.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-2127

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

A Petition for Review of an Order from
the National Labor Relations Board

ARGUED APRIL 13, 1979—DECIDED JULY 26, 1979

Before CUMMINGS, SPRECHER, *Circuit Judges*, and BONSAL, *Senior District Judge.**

SPRECHER, *Circuit Judge.* The employer, Hendricks County Rural Electric Memebership Corporation (REMC), appeals from a decision of the National Labor Relations Board finding that REMC engaged in unfair labor practices in violation of sec-

* The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

tion 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 158(a)(1). The principal issue presented by this appeal is whether the personal secretary to the general manager of REMC was an "employee" under section 2(3) of the Act. 29 U.S.C. § 152(3). We hold that the Board did not apply the appropriate legal standard for resolving this issue and remand for a factual application of the proper standard.

I

On May 9, 1977, the general manager of REMC, Wallace Dillon, discharged his personal secretary, Mary Weatherman. The General Counsel charged that Weatherman was discharged for engaging in concerted activities protected by section 7 of the National Labor Relations Act. The administrative law judge conducted a hearing and determined that Weatherman was an "employee" within the coverage of the Act, that she had engaged in protected concerted activity and that Dillon discharged her for that activity. The judge ordered REMC to reinstate Weatherman with back pay.

The facts surrounding Weatherman's discharge were carefully established by the administrative law judge. Lloyd Hadley, a close friend of Weatherman, was injured in the course of employment in February 1976, resulting in the loss of an arm. In March 1977, Hadley sought reinstatement with REMC. The Board of Directors notified Hadley in April that he would not be reinstated.

The first week in May, a petition requesting reconsideration of the decision not to reinstate Hadley was mailed to members of the Board. The petition was signed by 26 employees. Mary Weatherman signed the petition; she was the sixth employee to do so. On

Saturday, May 7, one of the directors called Dillon at home to advise him of the petition. Dillon drove to the director's home that day in order to see the petition.

At 10:00 a.m. on Monday, May 9, Dillon discharged Weatherman. At the hearing, Dillon testified that he discharged Weatherman for conduct unrelated to the Hadley petition. The administrative law judge conducted an extensive and careful evaluation of the evidence and concluded that Dillon's explanation of the discharge was "ludicrous."

We conclude, contrary to the argument of the employer, that the judge's decision that Mary Weatherman was discharged for signing the Hadley petition is fully supported by the evidence.[1] REMC argues additionally that the circulation of the Hadley petition was not conduct protected by the Act and that Mary Weatherman was not an employee protected by the Act. Although we conclude that the judge correctly characterized Mary Weatherman's conduct as "protected," we find it necessary to remand the decision for a new determination of her "employee" status.

II

REMC was guilty of an unfair labor practice in this case only if Mary Weatherman was discharged for engaging in "concerted activities for the purpose of . . . mutual aid or protection." Section 7, 29 U.S.C. § 157. The circulation of the petition among the employees was undoubtedly "concerted," but

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[1] The ALJ also found that REMC violated the Act by improperly interrogating another clerical employee about the petition. We find this conclusion is also supported by the evidence.

REMC disputes that it was circulated for the "purpose of mutual aid or protection."

The Board has only recently reiterated that circulation of a petition on behalf of a discharged employee is protected activity under section 7. *Youngstown Osteopathic Hospital Association*, 224 N.L.R.B. 574 (1976). Such activity is protected even if the discharge of the employee was lawful. *See, e.g., NLRB* v. *Pepsi-Cola Bottling Co.*, 449 F.2d 824, 830 n.5 (5th Cir. 1971).

Employee conduct should similarly be protected when the petition criticizes the employer's refusal to reinstate an injured employee. The administrative law judge specifically found the petition was motivated in part by the employees' desire to promote their own future well being should they be faced with a similar misfortune. Refusal to reinstate a former company employee seriously injured on the job is an issue about which the REMC employees "had a legitimate interest . . . in making known their views to management without being discharged for that interest." *NLRB* v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948).[2]

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[2] *Allied Chemical & Alkali Workers, Local No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), strongly relied on by the employer, simply does not undermine this conclusion. In *Pittsburgh Plate Glass*, the Court refused to find that reduction of the retired employees' pensions was a mandatory subject of bargaining. Mandatory bargaining extends only to the " 'terms and conditions of employment' of the employer's 'employees' . . . ." 404 U.S. at 164. The scope of activity protected under section 7 is obviously much broader, extending to concerted activity engaged in for the purposes of mutual aid and protection. Thus the fact that REMC may not have been under an obligation to bargain with the employees over Hadley's reinstatement in no way limits the employees' freedom to circulate a petition on his behalf.

III

Although the ALJ properly concluded that the circulation of the petition was protected activity, that protection can only extend to an individual who is an "employee" under the Act. Despite the breadth of the definition of "employee," [3] the Supreme Court has established that certain categories of employees are impliedly excluded from that definition. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). REMC argues that individuals working in personnel departments or as confidential secretaries are impliedly excluded and that Weatherman fits in both categories.

In determining whether Mary Weatherman was a statutory "employee," the ALJ applied a well-established Board standard. The judge ruled that Mary Weatherman was only excluded from the Act if she "assist[ed] and act[ed] in a confidential capacity to persons who formulate, determine, and effectuate

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[3] The Act provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 2(3), 29 U.S.C. § 152(3).

management policies in the field of labor relations." 236 N.L.R.B. No. 212 Appendix at 7, *quoting B. F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956). Examining the evidence carefully, the judge determined that Weatherman "did not act 'in a confidential capacity' to Dillon in any meaningful sense with respect to [employer's] labor relations policies. . . ." *Id.* The ALJ also found that Weatherman was not working in a position equivalent to a personnel department employee, a finding which we do not consider clearly erroneous. The judge therefore concluded that Weatherman was a statutory "employee."

We do not believe that the judge erred factually by finding that Weatherman did not assist in a confidential capacity with respect to labor relations policies. We do conclude, however, that the use of the *B. F. Goodrich* standard was an error of law.

This Court has previously held that "confidential" secretaries are excluded from the Act. *Peerless, Inc.* v. *NLRB*, 484 F.2d 1108 (7th Cir. 1973). *See also NLRB* v. *Wheeling Electric Co.*, 444 F.2d 783 (4th Cir. 1971). The *B. F. Goodrich* standard does represent current Board law on the question of whether a secretary should be considered an excluded "confidential secretary." *See Willett Motor Coach Co.*, 227 N.L.R.B. 882 (1977); *Minneapolis Star and Tribune Co.*, 222 N.L.R.B. 342, 343 (1976); *California Inspection Rating Bureau*, 215 N.L.R.B. 780, 783 (1974). Nonetheless, we believe that standard was exposed to serious question by the 1974 decision of the Supreme Court in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

In *Bell Aerospace*, the Supreme Court confronted the issue of whether buyers in an employer's purchasing department were statutory employees or were ex-

cludable as managerial employees. The Board argued that even though the buyers were managerial, they were covered by the Act since their jobs were unrelated to the "formulation and implementation of labor relations policies." 416 U.S. at 272. The Supreme Court disagreed, holding that all managerial employees were excluded from the Act without regard to any employment nexus to labor relations policies.

The Supreme Court was not presented with the issue of whether all secretaries acting in confidential capacity are also excluded from the Act without regard to labor relations nexus. Nor do we think that the policies favoring the exclusion of all managerial employees from the Act necessarily dictate the exclusion of all confidential secretaries as well. Nonetheless, the Supreme Court interpretation in *Bell Aerospace* of the 1947 amendment to the National Labor Relations Act and its legislative history requires the conclusion that all confidential secretaries are excluded.

In 1947, Congress passed the Taft-Hartley Act, amending the National Labor Relations Act to exclude "supervisors" from the Act.[4] The House bill, H.R. 3020, 80th Cong., 1st Sess. (1947), excluded,

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[4] The Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 2(11), 29 U.S.C. § 152(11).

through its definition of supervisor, those employees "employed in labor relations, personnel, [or] employment . . . matters" as well as those "who by the nature of [their] duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of employer." 416 U.S. at 279-80 n.9. The Senate Bill, on the other hand, did not enumerate these two categories of employees for exclusion.

Although the Senate version of the Bill was eventually enacted, the Conference Committee Report emphasized that "persons working in labor relations, personnel and employment departments" and "confidential secretaries" were considered excluded. A specific provision "was not thought necessary . . . since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35-36 (1947). Relying on this legislative history, the Supreme Court in *Bell Aerospace* concluded that confidential employees, including confidential secretaries, were persons "who both the House and the Senate believed were plainly outside the Act." 416 U.S. at 283.

Proceeding from the interpretation that confidential secretaries were excluded from the Act, the Court reasoned that managerial employees should also be impliedly excluded. The Court concluded: "The Court of Appeals in the instant case put the issue well: '. . . Surely Congress could not have supposed that, while 'confidential secretaries' could not be organized, their bosses could be.' " *Id.* at 284, quoting 475 F.2d at 491-92.

The Court thus clearly read the 1947 history as indicating a Congressional intention to exclude con-

fidential secretaries. The Court's opinion and various segments of the legislative history further clarify that "confidential" status was not to be defined by reference to labor relations. The Court stated, "[t]he discussion of 'confidential employees' in both the House and Conference Committee Reports . . . unmistakably refers to that term as defined in the House bill, which was not limited just to those [employees] in 'labor relations.'" 416 U.S. at 284 n.12. The House Report, in no uncertain terms, expressed an intention that "confidential" status not be restricted by a labor nexus.

> [P]rotecting confidential financial information from competitors and speculators, protecting secret processes and experiments from competitors, and protecting other vital secrets ought not to rest in the administrative discretion of the board . . . . The bill therefore excludes from the definition of employees persons holding positions of trust and confidence whose duties give them secret information.

H.R. Rep. No. 245, 80th Cong., 1st Sess., as cited in *NLRB* v. *North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 606 (8th Cir. 1971).

The conference report, as excerpted above, states that no specific exception was necessary since the Board already excluded such individuals. In fact, the Board has historically excluded only those confidential secretaries working for individuals in the field of labor relations. *See, e.g., Consolidated Vultee Aircraft Corporation*, 54 N.L.R.B. 103, 113 (1943). Nonetheless, the Supreme Court found that although "Congress may have misconstrued . . . Board practice," it "clearly thought that the Act did not cover

'confidential employees' even under a broad definition of that term.' " 416 U.S. at 268 n.12.[5]

The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act. The administrative law judge in this case limited his factual inquiry to a determination that Weatherman had not acted in a confidential capacity with respect to labor relations. We therefore find it necessary to remand the case [6] for a determination of whether "by the nature of [her] duties" she was "given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer." H.R. 3020 § 2 (12) (C), 80th Cong., 1st Sess. (1947). See also 416 U.S. at 284 n.12. The determination of "confidential" status is of course a question appropriately committed to Board discretion. As the Supreme Court stated in *Bell Aerospace*, "the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' [or confidential] must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management." 416 U.S. at 290 n.19. The order is reversed and remanded for proceedings consistent with this opinion.

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[5] See also note 10 of the Second Circuit opinion in *Bell*. 475 F.2d 485, 492.

[6] As to the necessity for remand in a case such as this, *see Bell Aerospace*, 416 U.S. at 290; *FTC* v. *Sperry & Hutcherson Co.*, 405 U.S. 233, 249 (1972).

BONSAL, *District Judge*, dissenting.

I would affirm. The record satisfies me that Mary Weatherman was not a "confidential secretary" and was covered by the Act. The finding of the administrative judge that she was discharged for engaging in protected concerted activity, viz., the circulation of the petition asking reconsideration by the Board of Directors of its decision not to reinstate Hadley, was supported by substantial evidence.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX E

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION *and* MARY M. WEATHERMAN

Case 25-CA-8921

July 17, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

On April 4, 1978, Administrative Law Judge Bernard Reis issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the Decision of the Administrative Law Judge.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] The Respondent has also filed a motion entitled "Motion to Strike General Counsel's Brief to the Board." In its motion, the Respondent characterizes the General Counsel's brief as an answering brief and asserts that it does not comply with Sec. 102.46(d)(1) and (2) of the Board's Rules and Regulations, Series 8, as amended, which govern the filing of answering briefs. The General Counsel's brief, however, is clearly denominated as a brief in support of the Decision of the Administrative Law Judge. We note that Sec. 102.46(a) of the Rules and Regulations sets forth the provisions regarding the filing of such briefs and, upon careful examination, we have determined that the General Counsel's brief complies with the pertinent portion of that section in all respects. Accordingly, the Respondent's motion to strike is denied.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his remedy,[2] and to adopt his recommended Order.

In agreement with the Administrative Law Judge, we find that the Respondent's discharge of Mary Weatherman in violation of Section 8(a)(1) of the Act necessitates an order requiring the Respondent to cease and desist from infringing in any other manner upon the rights guaranteed employees by Section 7 of the Act. In our view, the Respondent's action in discharging Weatherman for engaging in protected concerted activity strikes at the heart of the rights intended to be protected by the Act. See *N.L.R.B.* v. *Entwistle Mfg. Co.*,[3] and *Electrical Fittings Corporation, a subsidiary of ITE Imperial Corporation.*[4] We specifically note the Respondent's rapid retaliation shortly after being made aware of Weatherman's participation in protected activity and the blatantly pretextual reasons given for her discharge. We further note that the Respondent coercively interrogated Martha Sellers who, like Weatherman, was one of the Respondent's 10 unrepresented clerical employees,[5] regarding the identity of the employee chiefly responsible for the circulation of the petition herein. Accordingly, we view the above-stated facts as establishing the Respondent's intention to thwart the basic

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[2] *See Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for rationale on interest payments.

[3] 120 F.2d 532, 536 (C.A. 4, 1941).

[4] 216 NLRB 1076 (1975).

[5] The Respondent's entire employee complement is comprised of approximately 35 employees.

purposes of the Act, and therefore conclude that a broad order is justified under the circumstances present in this case.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.[6]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all parties had the opportunity to present their evidence, it has been decided that we violated the law and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions

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[6] The Administrative Law Judge inadvertently failed to conform the notice with his recommended Order. We shall correct the notice accordingly.

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things.

WE WILL NOT discharge or otherwise discipline any employee for engaging in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT coercively interrogate employees about such activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent one, without prejudice to her seniority or other rights, privileges, or working conditions.

WE WILL make Mary M. Weatherman whole, plus interest, for any loss of pay or other benefits suffered by her as a result of her discharge.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard on December 22, 1977, and January 9, 1978, in Indianapolis, Indiana. The complaint,

denied in all material respects, alleges that the Respondent, Hendricks County Rural Electric Membership Corporation, violated Section 8(a)(1) of the National Labor Relations Act, as amended, by discharging Mary M. Weatherman on May 9, 1977, and by coercively interrogating another employee 2 weeks thereafter. I find the complaint supported by the evidence.

The parties have submitted briefs. On the basis of the demeanor of the witnesses, the entire record,[1] and the arguments advanced on brief, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Respondent is engaged, at Danville, Indiana, in the business of supplying electricity and related services. During the year preceding issuance of the complaint, it purchased and received in Indiana goods valued in excess of $50,000 from other States, and sold electricity at a value in excess of $500,000. Upon the factual concessions made in Respondent's answer to the complaint, I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE RELEVANT EVIDENCE

Respondent is a rural electric membership cooperative. While fundamental policies are established by a 10-man board of directors, its top executive officer is General Manager Wallace E. Dillon, who has occupied that position for 14 years. The basic issue presented is whether, on May 9, 1977, Dillon discharged

[1] Errors in the transcript have been noted and corrected.

Mary Weatherman, his secretary, because of her participation in concerted activities protected by Section 7 of the statute. At the time of her discharge, Weatherman had been employed by Respondent for more than 9 years, and had served as Dillon's secretary for 4 years.

Lloyd Hadley, a longtime employee of Respondent and a close friend of Weatherman's, was injured in the course of employment in February 1976, suffering the loss of an arm. Hadley recovered sufficiently so that, in March 1977, he sought reinstatement with Respondent. In April, the board of directors notified Hadley that he would not be considered for reinstatement to active employment.

Toward the end of April, a petition, addressed to the board of directors, circulated among Respondent's employees. The petition praised Hadley's outstanding past service to Respondent, stressed his surprising recuperation, spoke of his intense desire to return to work, and asked that the board reconsider its decision. The petition was signed by 26 employees, including both "outside" workers and office clerical employees.[2] Mary Weatherman signed the petition; she was the sixth employee to do so.

Copies of the petition were mailed to members of the board in the first week of May. At 3 p.m. on Saturday, May 7, Director Truax called General Manager Dillon at home, ascertained that Dillon had not seen the petition, and asked Dillon to come to Truax's house so that he might see Truax's copy. Dillon drove some 7 miles to do so.

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[2] The outside employees, about 25 in number, are represented by the International Brotherhood of Electrical Workers; the 10 clericals are not represented by a labor organization.

At 10 a.m. on Monday, May 9, Dillon discharged Weatherman. The reason given her for the termination and, as Dillon testified at the hearing, the only reason for the action, was that she had lied to him in the preceding week. The date of the incident relied on by Dillon as the sole reason for discharge is in dispute: Dillon testified that it occurred on Friday, May 6, but Weatherman said it was Thursday, May 5. The basic facts of the incident, however, are not in controversy.

In March, Dillon had received from Respondent's group retirement administrator two forms relating to Lloyd Hadley's disability claim, one a form to be filled out by Hadley, and the other to be completed by Hadley's physician. The forms were needed to establish Hadley's disability so that a waiver of premiums for his life insurance could be obtained. As of the first week in May, Hadley's form was virtually completed, except, apparently, for Hadley's signature, but Dillon was awaiting return of the other document by the physician. Dillon intended to return both forms to the retirement administrator at the same time.

On May 5 or 6, Dillon, who was in his office perusing a file folder which contained xeroxed copies of the Hadley form, asked Weatherman about her personal knowledge of Hadley's intentions ("if he was going to draw his long-term disability or what he was going to do about it"), and also inquired about the location of the original forms. Weatherman stated that the doctor had not returned his. Looking at the copy of Hadley's form, and noting the absence of any notation that the original had been mailed out, Weatherman asked Dillon if the original was in the file. When he said it was not, she said she must have

mailed it to a firm named J. F. Molloy and Associates, which administers Respondent's group medical insurance program.[3]

A while later, Dillon again inquired about the form, and Weatherman repeated that she must have sent it to Molloy. Several minutes later, Dillon inquired once more, received the same answer, and then asked her to call Molloy and tell them, if they had the form, to forward it to Respondent's broker. When Weatherman called and was told by Molloy that it had not received the form, she looked in her file on Hadley, which she thought Dillon had already done, and found the missing document.[4] She informed Dillon of the discovery and asked if he wanted it mailed to the broker; he said not to send it until the doctor's form had been received, at which time both could be sent together.[5]

On Monday, May 9, at or about 10 a.m., the first working day after he saw the petition with Weatherman's name on it, Dillon called Weatherman into his office and told her that because she had "fibbed" to him the previous week about having mailed out the form, she was discharged.

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[3] Weatherman testified that it was the practice to mail any forms with the designation "Bankers Life Company" on them (as the Hadley form had) to Molloy.

[4] Weatherman had not checked her files before because she had assumed that the file Dillon was looking at was her own. The record shows that Dillon maintained his own separate file on the Hadley case, and I assume that was in fact the file which Weatherman saw open before him.

[5] The foregoing findings are based on the testimony of Weatherman, a much more impressive witness than Dillon There is, however, not a great deal of conflict between their accounts.

At the threshold, I find that the disputed incident occurred on Thursday, May 5, rather than the following day. Weatherman testified that, after the solution of the missing form mystery, Dillon told her to tell Hadley to come in to see him the next time Hadley visited the office. The next day, May 6, Hadley dropped in, Weatherman conveyed the message, and Hadley apparently met with Dillon. Hadley, a credible witness, corroborated Weatherman's testimony.[6]

I further find that the sole reason for the discharge of Weatherman was the fact that she had signed the Hadley petition.

Dillon's claim that he discharged her for "fibbing" to him is preposterous. The facts surrounding the temporarily missing document, discussed above, make it plain that any sane person (which Dillon is) would have regarded Weatherman's failure to immediately locate the form as a simple error, not a deception. Asked at the hearing if he could conceive of any reason why Weatherman would want to lie about having sent the form to Molloy, Dillon could think of none. Dillon, who testified that he delayed firing Weatherman in order to spend the weekend considering the matter, unquestionably would have recognized, in so deliberating, that any "lie" about having sent the letter to Molloy would have been pointless, since, even if Weatherman had done so, it would have been the simplest matter to retrieve the form from Molloy, a

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[6] Respondent introduced, for purposes of impeachment, a note written by Weatherman on May 18 to a former business associate in which she discussed the circumstances of her discharge. In doing so, she stated in the first paragraph that Dillon had asked about the status of the form on "May 6th." In the second paragraph, however, Weatherman wrote, "This was on Thursday." The reference to May 6 was, as Weatherman testified, an obvious inadvertence.

local concern. In addition, since Respondent had, to Dillon's knowledge, retained a copy of the form, there was no possibility of loss.

I find too ludicrous for serious consideration the claim that Dillon, who purportedly debated the potential discharge at some length, finally concluded that this minor mistake should be characterized as a lie and the basis for discharging an employee with 9 years' tenure. The incredulity expressed by Weatherman in her final conversation with Dillon was apt: "Are you telling me that you are terminating me because of an insurance form that I said I had mailed and it hadn't been mailed but we didn't want it mailed anyway, and he said that's right."

Further support for the conclusion of pretext is found in Dillon's wholly inept attempt to explain the delay in firing Weatherman for the reason asserted. Since, had the incident actually occurred on Thursday, he could not have easily justified more than a 1-day delay, until Friday, for the asserted purpose of thinking the matter over, he shifted the date of the occurence to Friday, thus hoping to lend some plausibility to an otherwise surprising discharge at the beginning of the week.

But he did more. He added, as a reason for waiting until Monday, instead of having immediately punished Weatherman for the offense which allegedly occurred on Friday, that he had held back because he did not want to discharge her until he received the form from Hadley's doctor: "Over the weekend I had determined that when the form came in and I had it in my hand, then I was going to terminate her." Upon inquiry, he could furnish no explanation for this strange precondition. What he appeared to be saying was that it was critically important that Weatherman, and only Weatherman, be there to per-

sonally open the letter containing the doctor's form, or to write a letter asking for it, and yet he had no explanation why her presence was indispensable to such mundane tasks. There were nine other clericals in the office and Dillon was in good health; any of them, I feel certain, was up to the job of opening an envelope. This nonsensical explanation for delay further depreciates the value of Dillon's perilously frail reason for discharge.

I conclude, therefore, with no reservations, that the appearance of Weatherman's signature on the petition, seen by Dillon on Saturday, caused him to reach back to the preceding Thursday and magnify into a dischargeable offense the trivial incident which had occurred on that day.[7] Respondent, however, ad-

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[7] I have taken into account Weatherman's open testimony that, on Thursday, she had the "impression" that Dillon thought she "had intentionally held the form back for some reason," although "he didn't say that." How much of that impression is hindsight unconsciously influenced by the reason given to her for the discharge and by Dillon's testimony is unascertainable. But even if it were true that Dillon evinced such an attitude, I find, in view of the delay, the fact that no rational mind, after considering the matter, could have concluded that she had been intentionally lying, the deception about when the incident occurred, and the fatuous story about retaining Weatherman until the doctor's letter was received, that the precipitating cause for discharge of this 9-year employee was Dillon's interim awareness of the petition.

That Dillon would have been particularly upset about Weatherman's participation (and that of other employees) in the petition sent to the directors is, I note, demonstrated by her uncontradicted testimony that, in February 1977, when she had contacted some directors about certain innocuous travel plans, Dillon angrily warned her, "I never again want you to call the directors."

In reaching my conclusion about Dillon's motive, I have considered the testimony of Assistant Manager Wayne Spen-

vances two legal defenses to the claimed violation here. The first is that Weatherman was confidential employee and therefore not protected by the Act.

In *Wheeling Electric Company*, 182 NLRB 218, 220-221 (1970), the Board held that confidential employees are entitled to the safeguards afforded by Section 8(a)(1). That decision was reversed on review, 444 F.2d 783 (C.A. 4, 1971). Subsequently, although without reference to *Wheeling*, the Board approved the conclusion of a Trial Examiner that "there can be no inference that [confidential employees] are not accorded the protection of the Act from unfair labor practices." *Peerless of America, Incorporated*, 198 NLRB 982, 987 (1972). Finding persuasive the Fourth Circuit's *Wheeling* opinion, the Seventh Circuit denied enforcement of *Peerless* on this point. 484 F.2d 1108, 1112 (1973).

It would appear that *Wheeling* and *Peerless* represent the Board's last say on the issue, and I am therefore bound to reject the defense. In any event, my evaluation of the evidence leads me to conclude that the defense has no sufficient factual predicate.

The Board defines confidential employees as "persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *The B. F. Goodrich Company*, 115 NLRB 722, 724 (1956). There are thus two essential elements. The first is that the employee assist "in a confidential capacity." The second is that the person assisted ful-

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cer, who testified that Dillon displayed no "irritation" when he told Spencer, around May 10, about the petition, and that Dillon later said to Spencer that Weatherman had been terminated because she "storied to him about a letter." Spencer's testimony does not alter some rather plain facts.

fill all three roles *vis-a-vis* labor relations policies; in *B. F. Goodrich*, the Board stressed the word "and" between "determine" and "effectuate," and in *Weyerhaeuser Company*, 173 NLRB 1170, 1172 (1968), it reiterated that "the quoted considerations are to be assessed in the conjunctive." [8]

The record shows that Weatherman did not act "in a confidential capacity" to Dillon any meaningful sense with respect to Respondent's labor relations policies; it discloses, in fact, that the range of her duties was deliberately restricted so as to preclude her from doing so. By and large, Weatherman's duties related to the routine operations of Respondent's business. While she opened mail addressed to Respondent and Dillon, she credibly testified that she never saw copies of correspondence from Respondent's lawyers to the union which represented the outside workers, because Office Manager Donald Douglas removed all such mail before it reached her desk and gave it directly to Dillon. Weatherman further credibly testified that Dillon normally placed his own telephone calls, and that she did not keep a list of Dillon's appointments.[9]

There were no personnel files maintained in the partitioned office shared by Weatherman and Dillon. As she testified, and Dillon substantially agreed, the only files she maintained were for those employees who made insurance claims; Weatherman kept these files for her own convenience, to use in processing the claims, and they were apparently destroyed after a short period of time.

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[8] This approach, however, seems vulnerable to attack. It is hard to conceive that, if the assisted person only "formulates" policy, his confidential assistant will not be excluded.

[9] I do not believe Dillon's contrary testimony.

While Weatherman typed Dillon's letters, there is no evidence that any of them related to union or personnel matters. She said that the only union-related letters typed by her were notices to Respondent's counsel about the dates of the negotiating meetings held every few years. She testified without contradiction that she typed no intramural memoranda regarding labor policies, did not attend board meetings or internal management meetings, was not involved with negotiations, grievances, discipline, or rewards, and had nothing to do with payroll matters.[10]

Despite the fact that Weatherman worked for Dillon for 4 years, the only documents typed by her which Respondent introduced in evidence were minutes of meetings of the board of directors.[11] Those introduced contain references to the Hadley request for reinstatement, and I assume that other sets of minutes refer occasionally to personnel matters. However, these documents can hardly be considered confidential, since Respondent is a cooperative and presumably all members are entitled to see the minutes.[12] Moreover, the Board has held that occasional typing of material relating to personnel problems does not render an employee confidential in nature. *ITT Grin-*

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[10] Dillon testified that interviews with prospective employees "usually" are held in a conference room, and that, when "labor relations problems with the clerical people or with the outside people" arise, they are first handled by Spencer and Douglas, and then, if not resolved, "usually" considered by Dillon in a joint discussion in the conference room, where there is space for the participants.

[11] Weatherman typed these from drafts prepared by Respondent's counsel.

[12] Dillon agreed that Respondent has no "secret" papers.

nell Corporation, 212 NLRB 734 (1974); *Weyerhaeuser Company, supra.*

It is questionable whether Dillon falls into the category of "persons who formulate, determine, and effectuate" labor policies in the conjunctive sense intended by the Board in *B. F. Goodrich, supra.* While Spencer testified that Dillon was "responsible . . . for formulating management policies with regard to labor relations," Dillon himself testified that the board of directors in fact performed that function. While Spencer testified that determinations of "management policy concerning interpretations of the labor contract with the IBEW" were made by Spencer with "the approval" of Dillon, the latter testified that he had "no" function in "interpreting the labor contracts and labor relations among employees." Dillon further said that he participated "very little" in contract negotiations, although he would apparently be present at the meetings. It seems clear from Dillon's testimony that he plays a most passive role in labor and employee relations matters, and this obviously reflects on the assertedly "confidential" character of Weatherman's employment.

Dillon did, however, collect some papers relating to labor contract negotiations, including copies of the positions developed by Respondent's negotiating committee [13] and notes taken by him at negotiations, in "a file behind [his] desk." Weatherman has no duties with respect to these matters, and there is no evidence that she was even aware of the existence of the file.[14] But assuming that fact, the Board has never

[13] These are handed to him directly by Respondent's counsel.

[14] Dillon also "kept . . . at my desk" reports by an executive committee of the board appointed to consider Hadley's request for reinstatement. These also were handed to him by Respondent's counsel.

held that potential physical access to confidential matters is sufficient to characterize an employee as a confidential.

Early on, the Board noted that the exception applied to employees "who *in the normal performance of their duties* may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances, or other labor relations matters." *The Hoover Company*, 55 NLRB 1321, 1323 (1944), emphasis supplied. In *The Santa Fe Trail Transportation Company*, 119 NLRB 1302, 1304 (1958), the Board refused to exclude the "head file clerk who has charge of files in the general manager's office," and in *Hotel Employers Association of San Francisco*, 159 NLRB 143, 150 (1966), the Board stated, "Mere access to personnel records does not qualify an employee as a confidential employee." Following this line of cases, it was held in *Service Technology Corporation, a Subsidiary of LTV Aerospace Corporation*, 196 NLRB 1036, 1041 (1972), that an employee who had "access to [the project manager's] files, including those relating to personnel matters and such grievances as might arise," did not thereby act in a "confidential capacity" to him. Accord: *California Inspection Rating Bureau*, 215 NLRB 780 (1974). The possibility that Weatherman may have been in a position to rifle Dillon's desk no more makes her a confidential employee than does that same possibility convert the other nine clericals into confidentials; the fact is that she did not work with these concealed papers "in the normal performance of [her] duties."

Thus, even if Dillon were found to be the sort of conjunctive manager contemplated in *B. F. Goodrich*, it is clear that, as in *John Sexton & Co., Division of*

Beatrice Foods Co., 224 NLRB 1341 (1976), Weatherman's "duties do not involve her in a confidential capacity with his responsibilities" with respect to labor policies. Accordingly, I conclude that Weatherman was not a confidential employee as the Board defines that term.

Respondent's final contention is that Weatherman's signing of the petition did not constitute Section 7 activity because the petition concerned the plight of a former employee.[15]

Respondent relies on *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co., Chemical Division, et al.*, 404 U.S. 157 (1971), which held that changes in the benefits of retired employees are not a mandatory subject of bargaining. The question of whether retired employees are statutory "employees" represented by a union for purposes of Section 8(d) is, however, quite a different question from whether a petition circulated by active employees for the purpose of seeking the reemployment of a former colleague constitutes "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7.[16]

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[15] Although the record is unclear on this matter, and Hadley himself could not say exactly what his status was, I assume here that, as of May 1977, he had been officially removed from employment with Respondent. Dillon said Hadley "stop[ped] being an employee" in "approximately" April 1977.

[16] Indeed, in *Pittsburgh Plate Glass*, the Court did not deny the applicability of the statute to "applicants for employment" and "persons who have quit or whose employers have gone out of business"; it distinguished those cases because they involved individuals "who, unlike the pensioners here, were members of the active work force available for hire

In any event, the short answer to Respondent's argument, as General Counsel points out, is that the Board has only recently held that circulation of a petition seeking the reinstatement of a discharged employee is a protected concerted activity. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574 (1976).

I might also note the longstanding application of Section 7 to activities engaged in on behalf of non-employees, *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503 (C.A. 2, 1942), and employees in other bargaining units, *Signal Oil and Gas Company*, 160 NLRB 644 (1966), enfd. 390 F.2d 338 (C.A. 9, 1968). These cases turn on the potential for reciprocal support which the acting employees might bank on in the future. In the present case, there is the added factor that, in circulating the petition, the signers clearly had in mind not only Hadley's welfare but also their own future well being. The petition states, in part:

> It seems that the problem is no one is willing to speak up or defend what is right if it might mean jeopardizing one's own self. As long as you take care of number one, yourself, no one else matters. Well, other people do matter and Lloyd Hadley matters, to us and to many other people.
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> You hear much talk today about employees not wanting to give a full day's work for a full day's

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and at least in that sense could be identified as employees" (unlike the case before the Court, involving "individual[s] who [have] ceased work without expectation of further employment"). 404 U.S. at 168. But "further employment" for Hadley was precisely what the petition sought.

> pay, and not having any pride in their job; well, you just lost one that did. But what about the other side. Doesn't a company owe any kind of loyalty to an employee? When an employee gives you 15 years of work, doing more than his share, and then almost gives you his life, is this what he gets in return?

It seems plain that the Hadley case touched a collective nerve which inspired a group of ordinary citizens, who might not be individually "willing to speak up" because "it might mean jeopardizing one's own self," to boldly band together, finding needed strength in unity. And, in so uniting, they sought to arouse in Respondent a "kind of loyalty" which might not only serve Hadley's interest but also their own as well. By sparking some compassion for Hadley, the employees might have focused Respondent's attention on the need for greater generosity toward the work force as a whole. By taking up the cudgels for Hadley, the employees might have moved Respondent to appraise future disability retirement actions pertaining to themselves more conscientiously and deliberately. And, by obtaining Hadley's return to work and his successful performance thereof, the employees might have paved the way for their own return to work in similar circumstances.

In addition, it is reasonable to say that just as an expressed desire to have members of another racial group working alongside present employees literally relates to terms or conditions of employment, *N.L.R.B.* v. *Tanner Motor Livery, Ltd.*, 349 F.2d 1, 4 (C.A. 9, 1969), so too did this expression of a wish to have Hadley returned to the employment roster.

On the foregoing considerations, I conclude that the discharge of Weatherman on May 9, 1977, violated Section 8(a)(1) of the Act.

The complaint contains a separate allegation of unlawful interrogation. Martha Sellers, a bookkeeper, credibly testified that, on May 24, she went to Dillon "to talk to him about some problems in the office and about some feelings I had." She expressed the unease of the employees, in view of Weatherman's discharge, about having signed the petition. Dillon said the petition "had nothing to do with it" and that, if she did her job, she need not worry.[17] Sellers persistently alluded to the petition as the cause of Weatherman's discharge, and Dillon told her not to "mess with management." After some further discussion of other matters, Dillon asked "who passed the letter around and I said we weren't supposed to be talking about the letter."

Dillon did not testify about this conversation, and I credit Sellers. I further conclude that the question about "who passed the letter around" had a reasonable tendency to coerce Sellers in the exercise of such protected activity. It is true that Sellers initiated the conversation. It is also true that Dillon had attempted to assuage her concern that Weatherman's signature on the petition had caused her discharge. But Sellers had begun the talk by expressing her fear, and, by pressing the issue, had indicated to Dillon her continued uncertainty. When, after the discussion had passed on to other subjects, Dillon reverted to the matter which concerned Sellers and openly questioned her about the identify of the chief provocateur, I cannot imagine that such probing would not reasonably have led Sellers to infer an inordinate, and threatening, management interest in the matter. Her evasive answer so indicates.

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[17] Weatherman had filed her charge with the Board on the same day she was terminated.

I therefore find that Respondent coercively interrogated Sellers by the question Dillon posed on May 24, 1977.

CONCLUSIONS OF LAW

1. Hendricks County Rural Electric Membership Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By discharging Mary M. Weatherman on May 9, 1977, Respondent violated Section 8(a)(1) of the Act.
3. By coercively interrogating Martha Sellers on May 24, 1977, Respondent violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act by certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be required to offer reinstatement to Mary M. Weatherman, and to make her whole for any loss of earnings she may have suffered by reason of her unlawful discharge, by payment to her of a sum of money equal to that which she normally would have earned from the date of discharge to the date of a valid offer of reinstatement, less her net earnings during that period, to be computed in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). I shall

also recommend that Respondent post an appropriate notice.

Upon the foregoing findings of fact and conclusions of law, the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:

ORDER [18]

The Respondent, Hendricks County Rural Electric Membership Corporation, Danville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or taking other adverse action against any employee in circumstances constituting interference with, restraint of, or coercion of employees in the exercise of their rights under Section 7 of the Act.

(b) Coercively interrogating employees about their protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Offer to Mary M. Weatherman immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent job, and

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[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

make her whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the backpay due under the terms of this recommended Order.

(c) Post at its place of business in Danville, Indiana, copies of the attached notice marked "Appendix." [19] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX F

Opinion by Judge Sprecher
Judge Bonsal dissenting

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 78-2127

Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Dudley B. Bonsal, Senior
District Judge*

July 26, 1979

Hendricks County Rural Electric
Membership Corporation, Petitioner

vs.

National Labor Relations Board,
Respondent

Petition for Review of an Order
from the National Labor Relations Board

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*The Honorable Dudley B. Bonsal, Senior District Judge of the Southern District of New York, is sitting by designation.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the National Labor Relations Board in this cause be, and the same is hereby, REVERSED, with costs, and REMANDED, in accordance with the opinion of this Court filed this date.

Office-Supreme Court, U.S.
FILED
FEB 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1103

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO CROSS-PETITION

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO CROSS-PETITION

As fully set forth in the Board's petition for a writ of certiorari in *NLRB* v. *Hendricks County Rural Electric Membership Corporation* (No. 80-885), the Board found that cross-petitioner (Hendricks) violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging employee Mary Weatherman for engaging in concerted activity protected by Section 7 of the Act, 29 U.S.C. 157. During the Board proceedings, Hendricks had defended by contending, among other things, that Weatherman was not entitled to statutory protection because she was a "confidential employee" and a "personnel department employee." The Administrative Law Judge (ALJ), whose findings were adopted by the Board, found that Weatherman's duties were "deliberately restricted so as to preclude her" from any "meaningful" labor-relations

functions that would render her either a "confidential employee" or the equivalent of a "personnel department employee" (Cross-Pet. App. 45a-49a). The court of appeals sustained this finding (Cross-Pet. App. 27a), and declined to enforce the Board's order only because it held that all "confidential employees," and not merely those with access to confidential labor-related information, were excluded from the Act's coverage, and that Weatherman was a "confidential employee" under the court's broader definition of that term (Cross-Pet. App. 27a-31a, 6a-8a).

The Board's petition in No. 80-885 presents the question whether the Board properly concluded that "confidential employees" are entitled to the full protection of the Act unless they have access to confidential labor-related information. The cross-petition seeks to present, if the Board's petition be granted, the further question whether Weatherman, in any event, was excluded from the Act's coverage because she was a "personnel department employee."

Because the court of appeals rejected Hendricks' claim that Weatherman was "working in a position equivalent to a personnel department employee" (Cross-Pet. App. 27a), it is clear that the issue that the cross-petition seeks to raise is merely a factual issue, which does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, there is no merit to Hendricks' additional contention (Cross-Pet. 15-16) that the ALJ failed to rule on this issue in his decision. Although the ALJ did not discuss the issue of Weatherman's status as a "personnel department employee" separately from her status as a "confidential employee" with a "labor nexus," the relevant portion of his decision (Cross-Pet. App. 45a-49a) clearly shows that the ALJ, in finding that Weatherman did not have any access to confidential labor-related information, also found that her duties with respect to personnel

matters—such as they were—were insufficient to affect her status as an employee entitled to the full protection of the Act.[1]

For these reasons, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1]Contrary to Hendricks' assertion (Cross-Pet. 16-19), *NLRB* v. *Allied Products Corp., Richard Brothers Div.*, 548 F. 2d 644 (6th Cir. 1977), does not "conflict" with the decision below. Indeed, the Sixth Circuit expressly applied the Board's "labor nexus" test for determining the status of confidential employees under the Act: "The Board has, with this court's approval, declined to treat secretaries as confidential unless the managers for whom they work are sufficiently engaged in labor-management negotiations to warrant exclusion of their secretaries from the benefits of collective[-] bargaining representation. * * * Furthermore, the secretaries must enjoy confidential status with respect to those labor relations functions." *Id.* at 648. In the present case, the Board found (Cross-Pet. App. 45a, 47a)—and the court of appeals agreed (Cross-Pet. App. 27a)—that General Manager Dillon's labor-relations role was too "passive," and Weatherman's duties with respect to such matters were too "restricted," to establish a "labor nexus."